

Supreme Court, U. S.
FILED

AUG 3 1976

MICHAEL ROBAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-443

HUGH CAREY, individually and as Governor of the State of New York, LOUIS J. LEFKOWITZ, individually and as Attorney General of the State of New York, ALBERT J. SICA, individually and as Executive Secretary of the Board of Pharmacy of the State of New York; and BOARD OF PHARMACY OF THE STATE OF NEW YORK,

Appellants,

against

POPULATION SERVICES INTERNATIONAL, DR. ANNA T. RAND, DR. EDWARD ELKIN, DR. CHARLES ARNOLD, THE REVEREND JAMES B. HAGEN, JOHN DOE and POPULATION PLANNING ASSOCIATES, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Appeal Docketed September 20, 1975

Probable Jurisdiction Noted
June 7, 1976

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Docket Entries—District Court.**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

74 Civ. 1572

POPULATION SERVICES INTERNATIONAL, DR. ANNA T. RAND,
DR. EDWARD ELKIN, DR. CHARLES ARNOLD, THE REVEREND
JAMES B. HAGEN, JOHN DOE, and POPULATION PLANNING
ASSOCIATES, INC.,

*Plaintiffs,**v.*

MALCOLM WILSON, individually and as Governor of the
State of New York; LOUIS J. LEFKOWITZ, individually
and as Attorney General of the State of New York;
ALBERT J. SICA, individually and as Executive Secretary
of the Board of Pharmacy of the State of New York;
and BOARD OF PHARMACY OF THE STATE OF NEW YORK,

Defendants.

DATE	PROCEEDINGS
April 18-74	Filed complaint & issued summons.
May 29-74	Filed ANSWER.
June 25-74	Filed Pltffs. Notice of Motion & Supporting affidavit. Re: 3 Judge Court. ret. 7/8/74.
June 25-74	Filed Pltffs. Memorandum of law.
Aug. 2-74	Filed Defts. Notice of Motion for Judgment. Ret. Sine Die.
Aug. 2-74	Filed Defts. Memorandum of Law.
Sept. 20-74	Filed pltffs' reply memorandum to defts' memorandum opposing motion seeking an order to convene a Three Judge Court.

Docket Entries—District Court.

DATE	PROCEEDINGS
Oct. 11-74	Filed stip & order—complaint is hereby supplemented. A Supplemental complaint be filed with this Court—Pierce, J.
Oct. 10-74	Filed Supplemental Complaint.
Oct. 23-74	Filed OPINION #41,354—defts' motion for judgment on the pleadings Rule 12(c) is denied. The pltffs' motion requesting the convening of a 3 Judge court is hereby granted. The request will be forwarded to the Chief Judge of this circuit upon filing of this opinion and order. So Ordered—Pierce, J. Mailed notices.
Jan. 20-75	Filed SUPPLEMENTAL ANSWER of defts. to supplemental complaint.
Jan. 20-75	Filed defts' memorandum of law in opposition to motion for a preliminary injunction.
Feb. 20-75	Filed pltffs' statement under Rule 9(g) & notice of motion for summary judgment. Ret. 1-23-75.
Feb. 28-75	Filed defts' statement under Rule 9(g) in opposition to pltffs. 9(g) statement.
March 6-75	Filed pltff's affdvt to confirm & offer into evidence, the allegations set forth in paragraph 14(a) of the supplemental complaint.
March 11-75	Filed Affidavit by Victor J. D'Amico, Pharmacy Inspector with NY State Board of Pharmacy.
July 2-75	Filed memorandum Opinion # 42718: In sum as applied to non-prescription contraceptives, of the New York State Education law 6811 (8) as presently drafted is declared to be unconstitutional in its entirety. As so applied, its enforcement is enjoined, etc., as indicated. The defts motion is denied. Submit Order on Notice. Friendly, J. Pierce, J. Conner, J. M/N

DATE	PROCEEDINGS
July 16-75	Filed Order that the Judgment and order of this court dated 7-16-75, be and hereby is stayed for fourteen days after the entry thereof and if within that period, defts should apply to the Supreme Court of the United States a stay pending appeal, until the disposition of such application, Friendly, J. Pierce, J. Conner, J. M/N
July 16-75	Filed Judgment and Order: The pltffs motion for summary judgment is granted and the defts motion to dismiss the complaint is denied, Friendly, J. Pierce, J. Conner, J.
July 24-75	Filed Notice that defts appeal to the U.S. Supreme Court from the judgment of this Court dated 7-18-75.
Oct. 22-75	Filed Pltffs reply memorandum.

Supplemental Complaint.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

1. This is a civil action seeking injunctive and declaratory relief. Plaintiffs seek a declaration that § 6811(8) of the New York State Education Law is unconstitutional insofar as it is applicable to nonprescription contraceptives, and an injunction against its enforcement to that extent. The challenged statute (1) prohibits the sale or distribution of contraceptive instruments, articles, recipes, drugs and medicines, including nonmedical or non-prescription contraceptives, to minors under the age of sixteen; (2) prohibits the sale or distribution of all contraceptives by any persons other than licensed pharmacists; and (3) totally prohibits and bans the advertisement or display of contraceptives. Failure to comply with the statute subjects the violator to conviction of a Class A misdemeanor and imprisonment up to one year. The statute is challenged on the grounds that it is in conflict with provisions of the First, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States.

2. Jurisdiction is conferred on this Court by the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution, by 28 U.S.C. § 1331, 1343(3) and (4), 2201, 2202, 2281 and 2284, and by 42 U.S.C. § 1983.

3. Plaintiff Population Services International (hereinafter referred to as "PSI") is a North Carolina non-profit corporation wholly devoted to scientific and educational goals and is exempt from federal income taxation under the

Supplemental Complaint.

Internal Revenue Code of the United States. Its principal office is located in Chapel Hill, North Carolina, and an office is maintained in New York County in the City and State of New York. Pursuant to its charter, PSI's primary objectives are to discover and implement new methods of conveying birth control information and services to persons not now receiving them, with the ultimate goals of reducing unwanted pregnancy and reducing fertility and population growth. Toward this aim, PSI includes among its activities test marketing of contraceptive products, contraceptive product development, direct mail patient recruitment, the use of commercially proven techniques for informing and motivating persons about family planning, and the advertisement and display of contraceptive products. PSI performs its educational, scientific and research activities in the United States, including the State of New York, and abroad, and receives its funds in part from federal grants and contracts.

4. Plaintiff, Dr. Anna T. Rand, a resident of the County of New York, City and State of New York, is a physician licensed to practice medicine in New York State. She received her Bachelor's Degree from New York University in 1933 and her medical degree from Boston University Medical School in 1937. Plaintiff Dr. Rand is an obstetrician-gynecologist and serves as an assistant professor in said specialized field of medicine at the Albert Einstein College of Medicine in New York City. Additionally, plaintiff Dr. Rand is the Director of Family Planning for the Department of Obstetrics and Gynecology of the Albert Einstein College of Medicine and is the Director of Family planning at the Bronx Municipal Hospital. As Director of Family Planning at Albert Einstein College of Medicine and the Bronx Municipal Hospital, plaintiff Dr. Rand establishes, organizes and directs family planning programs

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which include among their activities, the distribution of contraceptives. Among those treated by plaintiff Dr. Rand and by said family planning programs are patients who are sexually active, including patients under the age of sixteen.

5. Plaintiff, Dr. Edward Elkin, a resident of the County of New York, City and State of New York, is a physician licensed to practice medicine in the State of New York. He received his Bachelor's Degree from Harvard College in 1960 and his medical degree from New York University School of Medicine in 1964. Plaintiff Dr. Elkin is a pediatrician, having served his residency in pediatrics at Babies Hospital at the Columbia Presbyterian Medical Center. Plaintiff Dr. Elkin is an Associate in Pediatrics at the Mount Sinai School of Medicine and practices medicine as a pediatrician and physician for adolescents at the Adolescent Clinic at the Mount Sinai Hospital in New York City. In such practice plaintiff Dr. Elkin regularly sees and treats as patients sexually active adolescents both under the age of sixteen and over the age of sixteen.

6. Plaintiff, Dr. Charles Arnold, a resident of the County of New York, City and State of New York, is a physician licensed to practice medicine in the State of New York. He received his Bachelor's Degree from University of Puget Sound in 1956 and his medical degree from McGill University in 1960. Plaintiff Dr. Arnold additionally received a Master's Degree in Public Health Studies from the University of North Carolina in 1964. Plaintiff Dr. Arnold is a Clinical Associate Professor of Preventive Medicine at New York University Medical School and is also a Professor at New York University Graduate School of Public Administration. Plaintiff Dr. Arnold's primary professional and academic interests include the study and practice of family planning and the

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establishment of programs for the distribution of contraceptive devices to sexually active adolescents, over and under the age of sixteen, located in urban areas, including New York City.

7. Plaintiff, The Reverend James B. Hagen, is an ordained minister of the Protestant Episcopal Church, and a resident of Kings County, in the City and State of New York. Plaintiff Reverend Hagen received his Bachelor's Degree from Mount Union College in Alliance, Ohio, and his theological training at the Episcopal Theological School in Cambridge, Massachusetts. He was ordained as a priest and minister of his church in 1966. Plaintiff Reverend Hagen is currently the Rector of St. Andrew's Episcopal Church located at 4917 Fourth Avenue, Brooklyn, New York. Plaintiff Reverend Hagen, under the sponsorship of his church, is the Coordinator of the Sunset Action Group Against V.D. Pursuant to a grant and program funded in part by the Office of Economic Opportunity, the Sunset Action Group Against V.D. sponsors a program in which male contraceptive devices are sold and distributed to local residents both over and under the age of sixteen, at the church and at a local retail outlet which is not a licensed pharmacy.

8. Plaintiff, John Doe (John Doe not being his real name because of fear of embarrassment if his real name were revealed), is a resident of the Town of Orangetown, Rockland County, in the State of New York. Plaintiff John Doe is forty-three years of age, is married, has four children, and engages actively in sexual conduct.

9. Plaintiff, Population Planning Associates, Inc. (hereinafter referred to as "PPA"), is a North Carolina corporation whose principal place of business is located at Chapel Hill, North Carolina. PPA also maintains an

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office in the County of New York, in the City and State of New York. PPA is primarily engaged in the retail sale of nonmedical contraceptive devices through the United States mails. PPA advertises its products in national periodicals entering New York State and from time to time places advertisements for its products in local periodicals in New York State. PPA fulfills orders which it receives from residents of New York State and mails contraceptive devices to New York residents from its office in North Carolina.

10. Defendant, Malcolm Wilson, is the Governor of the State of New York. He is charged under the Constitution of the State of New York (Article 4, § 3) to take care that the laws of the State of New York are faithfully executed, including § 6811(8) of the Education Law which is herein challenged as being in conflict with the Constitution of the United States. Defendant Wilson is being sued in his official capacity. On information and belief, defendant Wilson resides and conducts his official business from the Executive Mansion in Albany, New York, and also maintains an office for the conduct of his official business in the County of New York.

11. Defendant, Louis J. Lefkowitz, is the Attorney General of the State of New York. He is the head of the Department of Law of the State of New York (Executive Law § 60), and is charged with prosecuting and defending all actions and proceedings in which the state is interested (Executive Law § 63). Defendant Lefkowitz is being sued in his official capacity. On information and belief, defendant Lefkowitz resides and conducts his official business from the Capitol, in Albany, New York, and also maintains an office for the conduct of his official business in the County of New York.

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12. Defendant, Board of Pharmacy of the State of New York (hereinafter referred to as "Board"), is charged under the statutes and the law of the State of New York (Education Law, § 6804) with the enforcement, operation and execution of § 6811 (8) of the Education Law which is herein challenged as being in conflict with the Constitution of the United States, and defendant, Albert J. Sica, is its Executive Secretary. The defendants Board and Sica are being sued in their official capacities. On information and belief, defendant Sica resides in Albany, New York, and defendants Board and Sica conduct their official business from the Office of the State Board of Pharmacy in Albany, New York.

13. In December of 1971, plaintiff PPA received a letter from defendant Sica, as Executive Secretary of defendant Board, dated December 1, 1971, advising plaintiff PPA that its advertisement soliciting the sale of condoms in any issue of the Utica College Tangerine, the student newspaper at such college, was in violation of § 6811(8) of the New York State Education Law. A copy of such letter is annexed hereto as Exhibit A.

14. Some time in February of 1973, plaintiff PPA received a letter from the Assistant to defendant Sica, writing on behalf of defendant Sica, dated February 23, 1973. This letter informed plaintiff PPA that the solicitation of sales for contraceptive devices by PPA via magazine advertisements was in violation of the New York law which prohibited the sale of contraceptives to minors under the age of sixteen and limited sale only by licensed pharmacists. This letter warned plaintiff PPA that if it failed to comply with the statute, the matter would be referred by defendant Board to defendant Lefkowitz, Attorney General of the State of New York, for legal action. A copy of said letter is annexed hereto as Exhibit B.

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14(a). On September 4, 1974, two inspectors engaged and employed by the defendants Board and Sica, its Executive Secretary, visited the New York office of the plaintiff PPA, for the purpose of threatening, and did then and there threaten, legal action against plaintiff PPA, if its advertisement appearing in the September 1974 issue of Playgirl Magazine, which, *inter alia*, advertised and solicited sales of nonprescription male contraceptives, or other similar advertising, were continued. A copy of the advertisement complained of is annexed hereto as Exhibit C. A copy of a Report completed by said defendants' inspectors, a copy of which was formally served on plaintiff PPA, is annexed hereto as Exhibit D. On information and belief, said visit and threat resulted from a complaint by a pharmaceutical manufacturer and distributor.

15. This case raises many questions under the Constitution and Laws of the United States, and the amount in controversy, with respect to each plaintiff, exceeds \$10,000.00, exclusive of interest and costs.

16. Section 6811(8) of the Education Law of the State of New York provides as follows:

"Sec. 6811. Misdemeanors

It shall be a class A misdemeanor for:

. . .

8. Any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of conception to a minor under the age of sixteen years; the sale or distribution of such to a person other than a minor under the age of sixteen years is authorized only by a licensed pharmacist but the advertisement or display of said articles, within or without the premises of such pharmacy, is hereby prohibited;".

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17. The provisions of New York State Education Law, § 6811(8), abridge, violate and conflict with the plaintiffs' rights under the First, Fifth Ninth and Fourteenth Amendments to the United States Constitution in at least the following respects:

(a) Plaintiff PSI is chilled, deterred and prohibited from performing its lawful functions under its charter in New York State. The purposes for which plaintiff PSI was formed and the activities which it undertakes include the encouragement and advancement of family planning and birth control through the distribution of nonprescription contraceptive devices, and the dissemination of information concerning contraceptives and advertisements for contraceptive products. PSI desires to implement its express and lawful aims by involving all species of retail distribution and sales outlets, in addition to licensed pharmacists, and also the various communications media, in the supply and advertisement of nonmedical contraceptive products. The challenged statute which prohibits PSI from carrying out its lawful and proper scientific and educational activities in New York is in violation of plaintiff PSI's rights under the First, Fifth and Fourteenth Amendments to the United States Constitution.

(b) Plaintiff Dr. Rand, as a primary part of her medical and professional practice and in her capacity as Director of Family Planning at Albert Einstein College of Medicine and the Bronx Municipal Hospital, treats a patient population with substantial rates of unwanted pregnancies and venereal disease. Plaintiff Dr. Rand believes that it is medically imperative to be able to distribute contraceptives to the patients who come under her care, including sexually active adolescents under the age of sixteen, without the threat or fear of violating the law and possible criminal prosecution.

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Plaintiff Dr. Elkin, as a significant part of his medical practice, treats sexually active adolescents. Because females under the age of sixteen bear children with a higher incidence of prematurity and infant mortality, and because of the trauma of abortion to a teenage female, particularly girls under the age of sixteen, and the difficult educational, physical and social problems faced by adolescents under the age of sixteen who bear children, plaintiff Dr. Elkin regards it as medically imperative to be able to sell or distribute contraceptives to such sexually active adolescents without the fear or threat of criminal prosecution. Additionally, plaintiff Dr. Elkin treats sexually active patients, married and unmarried, over the age of sixteen, and for reasons of sound medical practice wishes to sell or distribute contraceptive products to such patients.

Plaintiff Dr. Arnold, as part of his medical practice and as part of his activities as a researcher and academician in the field of family planning and birth control, operates programs supported by the federal government and otherwise to distribute nonmedical contraceptive products to adolescents in ghetto areas in New York City.

This statute which prohibits plaintiffs Drs. Rand, Elkin and Arnold from providing contraceptives to their patients, including adolescents under the age of sixteen, without fear of criminal prosecution, chills and deters them from practicing their professions as physicians and educators in violation of their rights under the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

(c) Plaintiff Reverend Hagen is an Episcopal priest who is the Coordinator of a program sponsored by St. Andrew's Episcopal Church which distributes male contraceptive devices to local residents both over and under the age of sixteen, at St. Andrew's Episcopal Church and at a local retail store near the Church which is not a licensed

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pharmacy, and which does not employ a licensed pharmacist. This statute which on its face prohibits the plaintiff Reverend Hagen from distributing contraceptive devices without fear of criminal prosecution chills and deters him from undertaking activities sponsored by his church and in part supported by the federal government, in violation of his rights under the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution. Moreover, plaintiff Reverend Hagen is thereby chilled and deterred from the proper performance of his pastoral duties to congregants of his church and others, many of whom seek out his advice and assistance in connection with birth control and family planning problems.

(d) Plaintiff John Doe is a married resident of New York, is forty-three years old and is the father of four children, two of whom are under the age of sixteen. Plaintiff John Doe's residence is approximately two miles distant from the nearest licensed pharmacist. This statute which precludes plaintiff John Doe from purchasing contraceptives at retail outlets other than those operated by licensed pharmacists, which impedes plaintiff John Doe from learning and gaining information or knowledge concerning contraceptive products, and which prohibits him from distributing or displaying contraceptives to his children, violates and burdens his right of privacy and liberty in matters related to family, marriage and sex, and burdens unduly his and his wife's right to determine whether to bear children. The limitation of sale of contraceptives to retail outlets operated by licensed pharmacists increases the likelihood that plaintiff John Doe will be unable to obtain such products at the times when they are needed. Accordingly, said statute violates plaintiff John Doe's rights under the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

Supplemental Complaint.

(e) Plaintiff PPA has been threatened with criminal prosecution for advertising contraceptive products in New York State and for selling contraceptive products to residents in New York State through the United States mails. Plaintiff PPA would own and operate a retail outlet in New York State, not operated as a licensed pharmacy, for the sale and distribution of nonmedical contraceptives, but is prohibited from undertaking such business activity by § 6811(8) of the Education Law. The statute which directly operates to the detriment of plaintiff PPA's lawful business activities, is in violation of plaintiff PPA's rights under the First, Fifth and Fourteenth Amendments to the United States Constitution. Further, said statute which allows licensed pharmacists to sell or distribute contraceptives while forbidding plaintiff PPA from selling or distributing contraceptive products either through the mails or through a nonlicensed retail outlet in New York State, is a violation of plaintiff PPA's rights to equal protection under the Fourteenth Amendment to the United States Constitution.

18. The provisions of § 6811(8) of the Education Law of the State of New York which impinge upon the fundamental rights of free speech, privacy and due process, do not promote any compelling State interest and are not rationally related to any proper or legitimate governmental concern. The statute, *inter alia*, invidiously discriminates between groups on the grounds of age and otherwise bestows special privileges upon one group (licensed pharmacists) without any rational basis and without any corresponding benefit to the public health and welfare.

19. The limitation of sales of nonprescription contraceptives to licensed pharmacists does not protect the health of New York citizens. The United States Food and Drug Administration, in accordance with Federal statutory pro-

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visions, e.g., 21 U.S.C. § 353, determines which contraceptives require a prescription and may therefore be dispensed only by a licensed pharmacist. Invalidation of the challenged New York statute would allow nonprescription contraceptives to be sold elsewhere, as is the case with a multitude of other non-prescription products, and would have no effect on the continuation of limited availability only through licensed pharmacists of prescription-required products. The statute, by limiting the right to sell such products to licensed pharmacists only, does not control the quality of contraceptive products. The United States Food and Drug Administration has jurisdiction over non-prescription contraceptive products and through its powers of inspection and setting standards, assures quality control regardless of the location of the place of sale.

20. The validity of the statute is not supported by any purported State interest in regulating the morality of citizens and minors of New York State. No evidence exists which would demonstrate that said statute discourages sexual conduct or sexual promiscuity. The statute challenged herein results in large numbers of unwanted pregnancies to females under the age of sixteen, large numbers of unwanted child-births and large numbers of abortions to such groups, and prevents distribution of the means to prevent or minimize unwanted pregnancies, abortions and venereal disease.

21. The provisions of the challenged statute which limit the sale or distribution to licensed pharmacists increase the price of contraceptive products and deter the competition that would result in lower prices for the consumer and wider use of the products by those in need of them.

Supplemental Complaint.

22. The utter irrationality of laws such as § 6811(8) of the New York State Education Law is demonstrated by the fact that many private and public groups, including the Commission on Population Growth and the American Future, chaired by John D. Rockefeller, 3rd, which was established by President Nixon and the United States Congress pursuant to Pub.L. No. 91-213 (March 16, 1970), have severely criticized such laws and demanded their repeal because of the impingement of individual liberty and the adverse serious social and health consequences caused by statutes such as the one challenged.

WHEREFORE, plaintiffs respectfully pray that this Court:

a) Assume jurisdiction of this cause and set this case down promptly for a hearing before a three-judge court pursuant to 28 U.S.C. § 2281 and 2284;

b) Enter preliminary and permanent injunctions pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining the defendants, their successors in office, agents and employees, and all other persons in active concert, participation and communication with them, from continuing to administer and enforce the provisions of § 6811(8) of the Education Law of the State of New York insofar as they apply to nonprescription contraceptives;

c) Enter a final judgment pursuant to 28 U.S.C. §§ 2201 and 2202, and Rules 54, 57 and 58 of the Federal Rules of Civil Procedure, declaring that § 6811(8) of the Education Law of the State of New York is invalid as applied to non-prescription contraceptives on the grounds that it is violative of provisions contained in the First, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States;

Supplemental Complaint.

d) Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, allow plaintiffs their costs herein and also grant them such additional or alternative relief as may seem to this Court just, proper and equitable.

Dated: September 25, 1974.

Karpatkin, Ohrenstein & Pollet
1345 Avenue of the Americas
New York, New York 10019
Tel. (212) 765-2700
Attorneys for Plaintiffs

By Michael N. Pollet
Member of the Firm

Exhibit A.

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
99 Washington Avenue
Albany, New York 12210

STATE BOARD OF PHARMACY
518: 474-3848

December 1, 1971

Population Planning Associates
105 North Columbia
Chapel Hill, North Carolina 27514

Gentlemen:

A recent issue of the Utica College Tangerie carried an ad on page 3 thereof in which your firm solicited the sale of condoms to students in this institution.

We are hereby advising you that you are in violation of Section 6811, Subdivision 8, of the New York State Education (Pharmacy) Law and request that you cease such activities in this state.

The law states that it is a misdemeanor for any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of conception to a minor under the age of sixteen years; the sale or distribution of such to a person other than a minor under the age of sixteen years is authorized only by a licensed pharmacist but the advertisement or display of said articles within or without the premises of such a pharmacy is hereby prohibited.

We would appreciate word from your organization of future compliance with our law.

Very truly yours,

ALBERT J. SICA
Albert J. Sica
Executive Secretary

JAA:jmd

Exhibit B.

THE STATE EDUCATION DEPARTMENT
99 Washington Avenue
Albany, New York 12210

STATE BOARD OF PHARMACY
518: 474-3848

February 23, 1973

Population Planning Assoc.
105 N Columbia
Chapel Hill, North Carolina 27514

Gentlemen:

The New York State Education (Pharmacy) Law prohibits the sale at retail of all contraceptive preparations to a minor under the age of sixteen years. Contraceptives may only be sold at retail in registered pharmacies by licensed pharmacists.

We are certain the solicitation of sales of your contraceptives for men via magazine ads through the mails do not comply with our law. A copy of Section 6811 subdivision 8 is enclosed.

Your compliance with our state pharmacy law will be appreciated. In the event you fail to comply the matter will be referred to our Attorney General for legal action.

Very truly yours,

Albert J. Sica
Executive Secretary
JOHN A. ARMAO

By John A. Armao
Assistant to the Secretary

JAA:pac
Encs.

cc: Robert H. Bovier
H. C. McAllister

20a

Exhibit C.**BIRTH CONTROL
PILLS**

Now only YOU AND YOUR DOCTOR need to know. Our registered pharmacist will fill your birth control pill prescription the same day it is received. You save time and money with our convenient mail order service. Inclose prescription and payment for three-month supply.

- ☐ Demulen Triopak (\$6.20) ☐ Ovral (\$7.60)
☐ Enovid-E (\$6.00) ☐ Ovulen Triopak (\$6.20)
☐ Ortho Novum-21 (\$6.30) ☐ Norlestrin Img. (\$7.30)

- ☐ Other Birth Control Pills (Send \$6.50 toward a three-month supply. Our pharmacist can read your prescription. We will bill or refund you for any difference.)

- ☐ Deluxe Sampler of 22 men's contraceptives, \$6

- ☐ Catalog alone (books, posters, clothes and more), 25¢

Mail today: Population Planning, Dept.
 120 East 56th Street, Suite 1520
 New York, New York 10022

21a

Exhibit D.

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
BOARD OF PHARMACY

Name of owner—indiv., partnership or corp. (If reg., name as on cert.): Population Planning Associates.

No. and street: 170 E. 56th St., R-1520.

City or Village: New York. Include Zip Code:
 County or Borough: Bx.

In re. assignment as:

Dated: / 196 . Initials ☐ KSG; ☐ JA; ☐ AGH;

Date: 9-4-74. Time: 2 PM. No. of S. S.

No. of samples: Cost:

Pharmacy: Reg. No.:

Manufacturer or Wholesaler:
 Reg. No.:

Storekeeper: Reg. No.:

Other:

ACTION TAKEN: ☐ Inspection; ☐ Reinspection; ☐ Telephone Calls; ☐ Other:

☐ Auction of:

Name of Owner and Address

Pharmacists' names according to original license:

Hours a week: Date and number of license:

Does name on *current* reg. and lic. agree?

(Supervising Pharmacist)

Exhibit D.

Does ownership continue as indicated above and on the registration certificate? ☐ Yes ☐ No. Hours open for business a week:

U. S. P. No.: Edition:

N. F. No.: Edition:

..

Handbook II: Yes ☐ No ☐.

Year:

Inspection Refused

Equipment

Label

Sanitation

Substitution

Proscribed drugs

Barbiturate irregularities

Outdated drugs not removed from stock

Refrigerable drugs not refrigerated

Prescription required for sale

Sale refused of prescription required items

Unlicensed person in charge

✓ Solicits B

Delinquency in registration

✓ Advertising for Contraceptives

Apprentice supervision

Insufficient No. of pharmacists

Pharmacist not registered

Pharmacist's license not displayed

Pharmacist's registration card not displayed

Comment or Recommendation: The above named advertised (attached is copy of advertisement) Birth control pills & male contraceptives—

Exhibit D.

The above named solicited prescriptions—which is illegal in NYS. The above sends the Bs to Kansas, for filling—the prescriptions must be pre-paid.

It also advertises male contraceptives—the requests are sent to Chapel Hill, North Carolina—the home office of the above.

Interviewed Mr. Philip D. Harvey, Pres. of Populations Planning Associates—He was advised to stop advertising for Prescriptions, to stop selling contraceptives—It is a violation of NYS Education Law.

Attached is a catalogue—

Section 6804 of the Education Law provides, in part, that it is a misdemeanor for "Any person to intentionally prevent or knowingly refuse to permit any examiner or inspector to enter a pharmacy, drug store or any other establishment for the purpose of lawful inspection in accordance with the provisions of this article."

Received copy

PHILIP D. HARVEY

President

Title

(TO BE SIGNED BY PERSON IN CHARGE AND KEPT ON FILE)

V. J. D'AMICO

Inspector

Continued on Back

Yes ☐ No ☐

Answer.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[S A M E T I T L E]

Defendants, by their attorney Louis J. Lefkowitz, for their answer to the complaint herein respectfully allege:

1. Deny each and every allegation paragraphs 2, 15, 18, 19, 20, 21 and 22.

2. Deny knowledge or information sufficient to form a belief as to the truth or accuracy of each and every allegation of paragraphs 3, 4, 5, 6, 7, 8, and 9.

3. Deny each and every allegation of paragraph 10 except admit that Malcolm Wilson is the Governor of the State of New York, that plaintiffs have named him as a defendant in this action, that Governor Wilson resides and conducts his official business in Albany, New York and also maintains an office in New York City and refer to Article 4 § 3 of the Constitution of the State of New York for the contents thereof.

4. Deny each and every allegation of paragraph 11 except admit that Louis J. Lefkowitz is the Attorney General of the State of New York, that plaintiffs have named him as a defendant in this action, that he has an office in Albany, New York and the County of New York and refer the Court to New York Executive Law §§ 60 and 63 for the contents thereof.

5. Deny each and every allegation of paragraph 12 except admit that Albert Sica is the Executive Director of

Answer.

the Board and that the offices of the Board are in Albany, New York and refer this Court to New York Education Law §§ 6804 and 681(8) for the contents thereof.

6. Deny each and every allegation of paragraph 13 except admit that a letter (Exhibit 4 of the complaint) was sent to plaintiff, Population Planning Association (PPA), and refer to that letter for the contents thereof and deny knowledge or information as to what the PPA received.

7. Deny each and every allegation of paragraph 14 except admit that a letter (Exhibit 3 of the complaint) was sent to Population Planning Association, and refer to that letter for the contents thereof and deny knowledge or information as what the Population Planning Association received.

8. Deny each and every allegation of paragraph 17 except deny knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations therein as (1) to the purposes of Population Services International, (2) as to the practices of Dr. Rand, (3) as to what is the significant part of Dr. Elkin's practice, as to what he regards as medically imperative or as to his treatment of sexually active patients, married and unmarried, over the age of sixteen, (4) as to Dr. Arnold's medical practices, his activities as a researcher and academician or as to his operating any program supported by the federal government or otherwise for the purpose of distributing nonmedical contraceptive products, (5) as to Reverend Hagen activities as the Coordinator of a program allegedly sponsored by St. Andrew's Episcopal Church, (6) as to John Doe's status as a married resident of New York, forty-three years of age with four children, two under sixteen, and his place of residence or (7) as to what Population Planning Association would own or operate in New York State.

*Answer.***AS AND FOR A FIRST AFFIRMATIVE DEFENSE**

New York Education Law § 6811(8) is in all respects constitutional and plaintiffs have failed to state a cause of action.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

Plaintiffs have failed to allege a case or controversy and have no standing to sue.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

Plaintiffs are immune from suit under the eleventh amendment.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

Venue is improperly placed in the Southern District of New York.

**AS AND FOR A FIFTH AFFIRMATIVE DEFENSE ON BEHALF OF
DEFENDANT BOARD OF PHARMACY**

Plaintiff Board of Pharmacy is not a person who may be sued under the statutes as set forth by plaintiffs in paragraph 2 of the complaint.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

Governor Malcolm Wilson is not directly responsible for enforcing § 6811(8) of the New York Education Law and is not a proper party hereto.

WHEREFORE, defendants request that the complaint herein be dismissed with costs.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants

Supplemental Answer.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendants, by their attorney Louis J. Lefkowitz, Attorney General of the State of New York, for their supplemental answer to the supplemental complaint herein, respectfully allege:

1. Repeat each and every allegation and defense as previously set forth in the answer to the complaint herein.
2. Deny each and every allegation of paragraph "14(a)" of the supplemental complaint except admit that two inspectors employed by the Board of Pharmacy did visit the offices of plaintiff Population Planning Associates for the purpose of gathering information concerning an advertisement appearing in the September, 1974 issue of Playgirl Magazine.

WHEREFORE, it is respectfully requested that the complaint and supplemental complaint be dismissed with costs.

Dated: New York, New York
January 15, 1975

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
By

ARLENE R. SILVERMAN
ARLENE R. SILVERMAN
Assistant Attorney General

Notice of Motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE, that upon all of the pleadings and papers heretofore filed herein, the annexed affidavits of Diana Altman, duly sworn to the 29th day of May, 1974, of Philip D. Harvey, duly sworn to the 24th day of May, 1974, and Dr. Anna T. Rand, duly sworn to the 20th day of June, 1974, and upon the accompanying memorandum of law, the plaintiffs herein, pursuant to 28 U.S.C. §§ 2281 and 2284, will move this Court on July 8, 1974, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel may be heard, at the United States Courthouse, Foley Square, New York, N.Y., for an order requiring that this action and the plaintiffs' motion for a permanent injunction, restraining the enforcement, operation and execution of § 6811(8) of the New York Education Law, be heard before a three-judge district court.

Dated: New York, New York
June 21, 1974.

Yours, etc.

KARPATKIN, OHRENSTEIN & POLLET
Attorneys for Plaintiffs

By MICHAEL N. POLLET
Member of the Firm

To: HON. LOUIS J. LEFKOWITZ
Attorney General of State of New York
Attorney for Defendants

Affidavit of Diana Altman.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NORTH CAROLINA }
COUNTY OF ORANGE } ss.:

DIANA ALTMAN, being duly sworn, deposes and says:

1. I am the Secretary-Treasurer and Director for Programming of Population Services International (hereinafter "PSI"), a plaintiff in this lawsuit, which seeks a declaration of unconstitutionality and an injunction against the enforcement of § 6811(8) of the New York State Education Law with respect to its applicability to nonprescription contraceptives. PSI's principal place of business is located at 105 North Columbia Street, Chapel Hill, North Carolina. PSI also maintains an office at 120 East 56th Street, New York, New York. I reside at 53 Davie Circle, in Chapel Hill, North Carolina. This affidavit is submitted in support of the plaintiff's motion for an order convening a three-judge court.

2. I received a baccalaureate degree from Florida State University in 1956, majoring in anthropology. In 1970 I was awarded a Master of Science in Public Health degree from the University of North Carolina, specializing in the fields of population and family planning administration.

3. I became associated with PSI in September of 1970, serving as the Director of Special Projects. I assumed my present office in 1973.

4. PSI was formed in January of 1970 as a non-profit corporation pursuant to the North Carolina Non-Profit

Affidavit of Diana Altman.

Corporation Act. PSI was granted exemption from federal income taxation in March of 1971, pursuant to 26 U.S.C. § 501(c)(3), as a non-profit corporation organized and operated exclusively for scientific and educational purposes. PSI's primary objective is to find new ways of bringing birth control information and services to people not now receiving them, with the ultimate goal of reducing unwanted pregnancy and of slowing population growth. The organization is particularly concerned with resolving the serious and increasing problem of unwanted pregnancies and venereal disease among the teenage population of the United States. PSI's activities are based upon the conviction that it is necessary to supplement the medically oriented traditional means of delivering family planning services in order to have any major impact upon the population crisis and the problems of unwanted pregnancies, abortions and venereal disease. Toward this end, PSI has initiated a series of programs serving to demonstrate the efficacy of harnessing commercial methods and resources in the population battle.

5. In 1972 and 1973, PSI received a grant totalling \$90,000 from the Office of Economic Opportunity of the United States Government for work in the United States in developing a pilot project wherein teenage males in inner-city and rural areas were supplied by direct mail with information on reproduction, venereal diseases, contraception, and promotion of the male responsibility for contraception.

6. Additionally, PSI has received a total of approximately \$500,000 in United States Government contracts from the Agency for International Development (AID), for work carried out in Kenya and the Philippines since January 1972. The projects in these countries are aimed at showing that direct mail, advertising and widespread retail outlets for the sale and distribution of contraceptives can

Affidavit of Diana Altman.

be an effective means for promoting family planning. PSI directs a similar project, funded by the International Planned Parenthood Federation, in Sri Lanka. PSI has also received grants for its work in the United States and abroad from The Population Council, the University of North Carolina, and various private foundations.

7. It is PSI's firm conviction that it is only through the mass marketing of nonprescription contraceptives such as the condom that problems of family planning and venereal disease can be effectively attacked. PSI desires to implement these programs by making nonprescription contraceptives available to all those who are sexually active through distribution and sale in all forms of retail outlets, and to educate the public through advertisements.

8. The New York State statute [Education Law, § 6811(8)] which limits the sale or distribution of nonprescription contraceptives to licensed pharmacists, which prohibits advertising or display of nonprescription contraceptives, and which forbids the sale of such products to minors under the age of sixteen, prevents PSI from carrying out its proper and lawful activities in New York State. Accordingly, it is causing PSI and the public which it wishes to serve in New York, irreparable harm and incalculable damage.

9. PSI has been advised by counsel that there is a substantial question as to whether § 6811(8) is constitutional in the light of recent decisions by the Supreme Court, and that in order to enjoin the enforcement of a state statute for repugnance to the United States Constitution it is necessary to convene a statutory three-judge court.

WHEREFORE, it is respectfully requested that this Court enter an order convening a three-judge court, pursuant to 28 U.S.C. §§ 2281 and 2284.

(Sworn to by Diana Altman, May 29, 1974)

Affidavit of Philip D. Harvey.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

PHILIP D. HARVEY, being duly sworn, deposes and says:

1. I am the President of Population Planning Associates, Inc. (hereinafter "PPA"), a plaintiff in this lawsuit. This affidavit is submitted in support of the plaintiffs' motion pursuant to 28 U.S.C. §§ 2281 and 2284, for an order convening a three-judge court.

2. I am a graduate of Harvard College, having received a Bachelor of Arts degree from that institution in 1961. After two years of service in the United States Army, I was employed by CARE from 1964 through 1969 and served as a Deputy Country Director for CARE in India, where my primary responsibilities included administration, child nutrition, agriculture, and the development of pilot programs for family planning. In 1969 I received a Ford Foundation Mid-Career Fellowship and I commenced studies at the University of North Carolina, from which I received a Master of Science in Public Health degree in 1970. My academic specialization was in the fields of family planning and birth control promotion. I have written extensively in this field and have annexed as Exhibit A to this affidavit a bibliography listing various published works.

Affidavit of Philip D. Harvey.

3. PPA was formed in March of 1971 as a North Carolina corporation. Its principal place of business is located in Chapel Hill, North Carolina, and an office is maintained in New York, New York. I have been the President and chief executive officer of PPA since its inception.

4. PPA's primary business activity is the retail mail order sale of nonprescription contraceptives for males (condoms). PPA publishes advertisements containing order forms for its products in periodicals throughout the United States including periodicals published and circulated in New York State. Examples of several of PPA's current advertisements are annexed to this affidavit as Exhibit B. Additionally, PPA publishes such advertisements in periodicals of national circulation whose readers include citizens of New York. PPA approves and fulfills orders for the products it sells from its North Carolina office.

5. As a result of the above mentioned marketing activities, PPA has on two occasions been threatened by the defendant, Albert J. Sica, Executive Secretary of the defendant Board of Pharmacy of the State of New York, and informed that its solicitation of sales of condoms via magazine advertisements is in violation of the provisions of § 6811(8) of the Education Law. In a letter dated December 1, 1971 (annexed to the complaint as Exhibit A), the defendant Sica formally advised PPA that it was in violation of § 6811(8) and requested that PPA cease its activities in New York. On February 23, 1973, the defendant Sica wrote (see Exhibit B annexed to the complaint) that PPA's failure to comply with § 6811(8) would result in the referral of the matter to the defendant, Louis J. Lefkowitz, Attorney General of the State of New York, for legal action.

Affidavit of Philip D. Harvey.

6. The provisions of § 6811(8) of the Education Law which make PPA's lawful, proper and constitutionally protected activities a crime, and the threats of the defendant Sica to prosecute PPA, have caused and are continuing to cause irreparable harm and damage to PPA. PPA has been chilled and deterred from fully carrying out all of its proper business activities in New York. On information and belief, many periodicals have refused to accept PPA's advertisements because of fear that they would be violating § 6811(8) and would be prosecuted thereunder. Further, PPA wishes to expand its activities in New York to include the ownership of a retail store which is not a pharmacy, to sell and distribute nonprescription contraceptives. From 1971 through 1973 PPA owned and operated such a facility in Chapel Hill, North Carolina. The New York law which makes it a crime to sell or distribute nonprescription contraceptives outside of a pharmacy is unlawfully constricting PPA's business activities.

7. PPA has been advised by counsel that there is a substantial question as to whether § 6811(8) is constitutional in the light of recent decisions by the Supreme Court, and that in order to enjoin the enforcement of a state statute for repugnance to the United States Constitution it is necessary to convene a statutory three-judge court.

WHEREFORE, it is respectfully requested that this Court enter an order convening a three-judge court.

(Sworn to by Philip D. Harvey, May 24, 1974)

EXHIBIT A

BIBLIOGRAPHY

Philip D. Harvey

FAMILY PLANNING AND POPULATION

- "Commercial Distribution of Contraceptives: A Non-Medical Supplement to the Family Planning Effort," (with T.R.L. Black), in *New Concepts in Contraception*, Malcolm Potts and Clive Wood, eds., Medical Technical Press, London, 1972.
- "Condoms—A New Look," *Family Planning Perspectives*, Volume 4, No. 4, October, 1972.
Reprinted as:
"Condoms—the Latest Look," *Sexology*, Volume 40, No. 1, August, 1973.
"Condoms—A New Look," *Medical Aspects of Human Sexuality*, July, 1973.
- "IE&C in the Commercial Marketing of Contraceptives," in *Information, Education and Communication in Population and Family Planning—A Guide for National Action*, Donald J. Bogue, W. Bert Johnson, Frank Wilder, eds., Community and Family Study Center, Chicago, 1973.
- "Improving Sales and Acceptance of Contraceptives," in *Fertility Control Methods—Strategies for Introduction*, Gordon W. Duncan et al, eds., Academic Press, New York, 1973.
- "Marketing Birth Control," in *Using Commercial Resources in Family Planning Communication Programs:*

Exhibit A.

the International Experience, Michael McMillan, ed., East-West Communication Institute, Honolulu, May, 1973.

"Marketing Contraceptives by Mail," (with J.U. Farley), *Journal of Advertising Research*, Volume 12, No. 5, October, 1972.

"Measuring Effectiveness in Family Planning," Michael McMillan, *op. cit.*

"Non-Clinical Birth Control—A Neglected and Promising Field," (with Diana L. Altman), editorial in *American Journal of Public Health*, Volume 63, No. 6, June, 1973.

INTERNATIONAL DEVELOPMENT

"Development Potential in Famine Relief—the Bihar Model," *International Development Review*, Volume II, No. 4, December, 1969.

Exhibit B, Samples of Current Ads.

**CONTRACEPTIVES
PRIVATELY BY MAIL**

Birth control is a personal, private matter. That is why Population Planning offers a broad line of contraceptives by mail. Foams, gels, rhythm aids, a lab pregnancy test and books on birth control. For women who believe men should share the responsibility of birth control we offer 20 famous-brand male contraceptives at very attractive prices, including Trojan, Conture, and new Jade. Send for free illustrated catalogue describing our products and services, or send \$3 for a sampler of 12 assorted male contraceptives and catalogue... all sent in a plain, attractive package. Satisfaction guaranteed for your money back!

OVER 60,000 SATISFIED CUSTOMERS



**At last...
condoms for men
who hate condoms**

For years condoms have been a necessary evil—essential but not very nice to use. So we at Adam & Eve sorted all the little things that make condoms less than pleasant and we developed new Jade.

ONE: Most condoms are too thick for real pleasure. Jade is so sheer you can hardly feel it. Yet because it is made of the very finest latex under strict government standards, Jade is as reliable as any condom you can buy.

TWO: Cheap lubricants have an unpleasant medicinal taste. Jade is specially lubricated with AE66 silicone "love" which is odorless and won't evaporate. This makes Jade easier to put on and gives much greater sensitivity.

THREE: Ordinary condoms come in a cold clinical package. Jade comes in a tastefully-designed soft wallet. It's sexy, not clinical.

FOUR: Jade sheaths are pale green, which apart from the color of masculine energy, makes them readily visible. So you don't have to worry if they're on properly.

FIVE: Jade even eliminates the awkward problem of disposal. Each sheath comes with its own self-seal plastic envelope for neat, esthetic disposal.

So if you hate to use condoms, mail the coupon and the pleasure of letting Jade, the very un-ordinary contraceptive, change your mind. It will be sent with our illustrated catalogue in a plain package. Satisfaction guaranteed or your money back.

New JADE[®] contraceptive

Adam & Eve, Dept. 000
105 N. Columbia, Chapel Hill, N.C. 27514

Please send me:

☐ One dozen Jade plus free catalogue. \$4

☐ Deluxe sampler of 22 leading condoms plus catalogue.

☐ Illustrated catalogue alone. 75¢

Many ways to order — Cash or check enclosed
— BankAmericard — Master Charge

Account No. _____ Card expires _____

Signature _____

Name _____ Address _____

City _____ State _____ Zip _____

CONTRACEPTION A JOINT RESPONSIBILITY

Birth control is a personal, private matter. That is why Population Planning offers a broad line of contraceptives — for men and women — by mail. The information in our catalog assists you in making a knowledgeable choice from the many leading brands of contraceptives. Delfen and Emko foam, gels, creams, rhythm aids, a lab pregnancy test, and books on birth control and sexuality. For women who believe men should share the responsibility of birth control we offer 20 of the best known male contraceptives, including the popular Trojan, sensitive Conture, and exciting new Jade — all at very attractive prices. Send just 25¢ for our illustrated catalog describing the products and services we have brought to over 50,000 satisfied customers, or send \$3 for a sampler of 12 assorted condoms and catalog — all sent in a plain, attractive package. Satisfaction guaranteed (or your money back).

Population Planning, Dept. 00000
105 N. Columbia, Chapel Hill, N.C.
27514

- ☐ Please send me the deluxe sampler of 12 assorted male contraceptives plus catalog. Enclosed is \$3.
- ☐ Please send illustrated catalog only. Enclosed is 25¢.

NAME _____

STREET _____

CITY _____ STATE _____ ZIP _____

*Because love is a
very private matter....*



**Contraceptives through
the privacy of the mail.**

Obtaining male contraceptives without embarrassment can be a problem. To solve that problem PPA is now offering reliable, famous-brand contraceptives, privately by mail. Popular brands like Trojan and Naturalamb, the exciting green-tinted Jade and the pre-shaped Conture. All these and many more, plus our complete line of books and personal products, are featured in the PPA illustrated catalogue, sent free with every order. Send just \$3 for a sampler of 12 condoms (3 each of 4 leading brands) or \$6 for PPA's deluxe sampler of 22 (8 different brands). Everything is mailed in a plain attractive package. You must be absolutely satisfied or your money back. Mail coupon today.

OVER 50,000 SATISFIED CUSTOMERS

Population Planning, 105 N. Columbia St.
Dept. 00-0, Chapel Hill, N.C. 27514

Gentlemen: Please send me:

☐ \$3 Sampler (4 different brands)
☐ \$6 Deluxe Sampler (8 different brands)
☐ Catalogue alone: 25c

Name _____
 Address _____
 City _____ State _____ Zip _____

Affidavit of Dr. Anna T. Rand.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

Dr. ANNA T. RAND, being duly sworn, deposes and says:

1. I am one of the physician-plaintiffs in this lawsuit which seeks a declaration of unconstitutionality and an injunction against the enforcement of § 6811(8) of the New York State Education Law with respect to its applicability to non-prescription contraceptives. My academic credentials and professional qualifications are set forth in paragraph "4" of the complaint. This affidavit is submitted in support of the plaintiffs' application requesting the convening of a three-judge court, pursuant to 28 U.S.C. §§ 2281 and 2284.

2. As set forth in the complaint, in my capacity as Director of Family Planning at The Albert Einstein College of Medicine and at Bronx Municipal Hospital, I am very extensively involved in family planning programs, and in the problems confronting physicians who deal with this aspect of health care. The population from which my patients are drawn has a high rate of unwanted pregnancy, abortions and venereal disease. My patients include large numbers of sexually active adolescents under the age of sixteen.

3. The statute in question, § 6811(8) of the Education Law, interferes with and frustrates the exercise of my pro-

Affidavit of Dr. Anna T. Rand.

professional medical judgment and the implementation of sound medical practice in a number of significant respects.

a. It is a fact of life in New York City and in New York State, of which all physicians who deal in this area are aware, that there are large numbers of persons who are sexually active and who do not utilize birth control devices, but who would use birth control devices if they were more generally available.

b. I encounter in my professional practice considerable incidence of venereal diseases, frequently arising from sexual intercourse without the use of a condom, under circumstances where were a condom utilized, the likelihood of venereal disease would be greatly lessened.

c. Such sexual activity without utilization of birth control devices results in a large number of unwanted pregnancies, a significant portion of which are terminated by abortions.

d. The limitation of sale of birth control devices, and particularly condoms and foam, to licensed pharmacists, reduces the number of available outlets for such devices and obviously increases the likelihood of sexual activity without contraception and consequent exposure to unwanted pregnancy, abortion and venereal disease.

e. The complete ban on the sale of such devices to minors under the age of sixteen, virtually insures increased venereal disease, unwanted pregnancy and abortion among such persons.

f. In my professional opinion, it is medically essential to increase the availability of and accessibility to these devices, particularly condoms and foam and particularly to patients such as those whom my colleagues and I see at my clinic.

Affidavit of Dr. Anna T. Rand.

g. I therefore believe that it is medically contraindicated to restrict the distribution of these sales to licensed pharmacists. These non-prescription devices should be available for purchase, at reasonable prices, at any retail establishment, as is the case with such other non-prescription devices and items as band-aids and aspirin.

h. The restriction on the sale to minors is medically even worse since it permits thousands of unwanted pregnancies and abortions which would otherwise have not occurred.

i. Probably most frustrating and harmful in terms of public health, is the complete prohibition of advertising and display of these devices. There is considerable and widespread ignorance concerning these devices and their efficacy, especially among persons who most need this information. Advertising and display and the consequent educational effect is prohibited by law regardless of whether the advertising is commercially oriented or part of a public health information program.

j. These prohibitions have an even more insidious effect in smaller suburban and upstate communities where the availability of birth control devices may be completely dependent on the limited hours of operation of a single pharmacy which may be located at some far distance from the consumer.

k. From the viewpoint of sound preventive medicine, as well as specifically from the viewpoint of the health of my patients, all three statutory restrictions should be eliminated.

l. My colleagues and I are deterred and chilled from public education, including the stimulation of public interest advertising concerning the accessibility and efficacy of these devices, all of which are vitally necessary as public health measures.

Affidavit of Dr. Anna T. Rand.

m. We are likewise deterred and chilled from advising sexually active adolescents to ask to purchase condoms and foam at pharmacies because any sales to them would be unlawful under the present statute.

4. The statute therefore prevents me from properly carrying out my lawful and ethical professional duties and obligations, namely, to give the best medical advice of which I am capable.

5. I have been advised by counsel that there is a substantial question as to whether § 6811(8) is constitutional in light of recent decisions of the Supreme Court and that in order to enjoin the enforcement of a State statute for repugnancy to the United States Constitution, it is necessary to convene a statutory three-judge court.

WHEREFORE, it is respectfully requested that this Court enter an Order convening a three-judge Court.

(Sworn to by Anna T. Rand, June 20, 1974.)

Opinion and Order.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 1572

POPULATION SERVICES INTERNATIONAL, DR. ANNA T. RAND,
DR. EDWARD ELKIN, DR. CHARLES ARNOLD, THE REVEREND
JAMES B. HAGEN, JOHN DOE, and Population Planning
ASSOCIATES, INC.,

Plaintiffs,

v.

MALCOLM WILSON, individually and as Governor of the
State of New York; LOUIS J. LEFKOWITZ, individually
and as Attorney General of the State of New York;
ALBERT J. SICA, individually and as Executive Secretary
of the Board of Pharmacy of the State of New York;
and BOARD OF PHARMACY OF THE STATE OF NEW YORK,

Defendants.

APPEARANCES:

KARPATKIN, OHRENSTEIN & POLLET
By: MARVIN M. KARPATKIN and
MICHAEL N. POLLET, Esqs.
1345 Avenue of the Americas
New York, New York 10019

Attorneys for Plaintiffs

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
By: ARLENE R. SILVERMAN, Esq.
Two World Trade Center
New York, New York 10047

Attorneys for Defendants

Opinion and Order.

LAWRENCE W. PIERCE, D.J.

Plaintiffs in this action seek a judgment declaring Section 6811(8) of the Education Law of the State of New York to be unconstitutional as violative of the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution, to the extent that the section is applied to non-prescription contraceptives. They also seek preliminary and permanent injunctions against enforcement of the section to that extent. Jurisdiction is grounded on 28 U.S.C. §§ 1331, 1343(3) and (4), 2201, 2202, 2281 and 2284, and 42 U.S.C. § 1983.

Plaintiffs have moved this Court for an order empanelling a three-judge district court to hear the case. Defendants oppose the motion and, in addition, have moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure (FRCP). For the reasons detailed below, the plaintiffs' motion is granted and the defendants' motion is denied.

The complaint contains a single count. Seven plaintiffs are named. Plaintiff, Population Services International (hereinafter PSI), is alleged to be a North Carolina non-profit corporation whose primary objectives are to discover and implement new methods of conveying birth control information and services to persons not now receiving them with the ultimate goals of reducing unwanted pregnancy, fertility and population growth. Its activities include test marketing, product development, advertisement and display of contraceptives. Its activities occur in the United States, including the State of New York. Part of its funds for educational, scientific and research activities is allegedly received from federal grants and contracts.

Plaintiff, Dr. Anna T. Rand, is a physician licensed to practice medicine in New York State. She is alleged to be the Director of Family Planning at Albert Einstein College of Medicine and at Bronx Municipal Hospital, both in New

Opinion and Order.

York City. Her family planning programs include the distribution of contraceptives. Her patients in such programs include sexually active persons who are under the age of sixteen.

Plaintiff, Dr. Edward Elkin, is a physician licensed to practice medicine in New York State. It is alleged that he practices medicine as a pediatrician and physician for adolescents at the Adolescent Clinic at Mount Sinai Hospital in New York City, where he treats sexually active adolescents under and over the age of sixteen.

Plaintiff, Dr. Charles Arnold, is a physician licensed to practice medicine in New York State. It is alleged that his primary professional interests include family planning and the establishment of programs for the distribution of contraceptive devices to sexually active adolescents over and under the age of sixteen.

Plaintiff, Reverend James B. Hagen, is an ordained minister of the Protestant Episcopal Church. He is alleged to be the Coordinator of the Sunset Action Group Against V.D., the sponsor of a program in which male contraceptive devices are sold and distributed, both at the church and at a local retail outlet which is not a licensed pharmacy, to residents of Brooklyn, New York, who are over and under the age of sixteen.

Plaintiff, John Doe, alleges that he is forty-three years of age, is married, has four children and engages actively in sexual conduct.

Plaintiff, Population Planning Associates (hereinafter PPA), is a North Carolina corporation which maintains an office in the County, City and State of New York. It is alleged to be primarily engaged in the retail sale of non-medical contraceptives through the United States mails. PPA advertises its products in national periodicals entering New York State and occasionally places such advertisements in local periodicals in New York State.

Opinion and Order.

The challenged statute reads:

"Sec. 6811. Misdemeanors

It shall be a class A misdemeanor for:

...

8. Any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of conception to a minor under the age of sixteen years; the sale or distribution of such to a person other than a minor under the age of sixteen years is authorized only by a licensed pharmacist but the advertisement or display of said articles, within or without the premises of such pharmacy is hereby prohibited;".

Plaintiffs urge that by virtue of the restrictions and prohibitions of the challenged statute, irreparable harm and incalculable damage result to each of them, to the public and to persons under age of sixteen. PSI and PPA contend that their objectives, *supra*, are being thwarted and chilled as a result of the statute. Drs. Rand, Elkin and Arnold, contend that their work with patients under and over age sixteen is directly affected by the subject law which prohibits the distribution by them of non-prescription contraceptives to adults as well as to minors. Reverend Hagen claims his work is similarly restricted. John Doe states that he is directly affected in his own sexual activities since he is unable to purchase contraceptives at retail outlets other than those operated by licensed pharmacists, of which the nearest is two miles from his family residence. Further, he states that he and his wife have four children, two of whom are under the age of sixteen, and that his right of privacy and liberty in matters related to educating his children about contraceptives is restricted. And he asserts that his right of privacy and liberty with respect to

Opinion and Order.

family planning, marriage and sex is violated and unduly burdened.

PPA has received three written communications from the State Board of Pharmacy. The first, dated December 1, 1971, informed PPA that an advertisement it had placed in a publication issued at a New York State college which solicited the sale of male contraceptives was a violation of the statute in question and sought PPA's "future compliance with [the] law." The second, dated February 23, 1973, asserted that PPA was not complying "with our law" by virtue of its "solicitation of . . . sales of contraceptives for men via magazine ads through the mails. . . ." It sought PPA's compliance with the subject law and stated, "In the event you fail to comply the matter will be referred to our Attorney General for legal action." The third, dated September 4, 1974, is a report of violation of the subject law made by State Board of Pharmacy inspectors, following a visit to PPA's New York office.

The motion before the Court seeks the convening of a three-judge court to consider this action and to hear the plaintiffs' motion for injunctive relief against enforcement of § 6811(8). The single district judge to whom such a request is made must consider whether a basis exists to convene a three-judge panel. The test to be applied is "whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute." *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962); *Nieves v. Oswald*, 477 F.2d 1109, 1111 (2d Cir. 1973).

The complaint seeks a declaration that § 6811(8) of the New York State Education Law is unconstitutional, insofar as it is applicable to non-prescription contraceptives, and an injunction against its enforcement to that extent. Clearly this claim meets the requirements of 28 U.S.C.

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§§ 2281 and 2284. The complaint also at least formally alleges a basis for equitable relief. As the Supreme Court recently stated:

“[A] refusal on the part of the federal courts to intervene when no state proceeding is pending may place the [federal] plaintiff between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.” *Steffel v. Thompson*, 415 U.S. 452, 462 (1974).

Plaintiffs here are in just such a situation.

The sole remaining question, therefore, is whether the constitutional claims set forth in the complaint are so constitutionally insubstantial as to require dismissal of the complaint. *Goosby v. Osser*, 409 U.S. 512 (1973) instructs that:

“‘Constitutional insubstantiality’ for this purpose has been equated with such concepts as ‘essentially fictitious,’ . . . ‘wholly insubstantial,’ . . . ‘obviously frivolous,’ . . . and ‘obviously without merit,’ . . . The limiting words ‘wholly’ and ‘obviously’ have cogent legal significance. To the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281.” *Id.* at 518.

This definition describes the powers of a single judge to dismiss a complaint where an injunction is sought on the basis of unconstitutionality “in the most limiting terms the

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Court has ever used.” *Roe v. Ingraham*, 480 F.2d 102, 106 (2d Cir. 1973). It is under this standard that the plaintiffs’ challenges to the three provisions of the statute—the prohibition against sale or distribution to any person under the age of sixteen, the prohibition against sale or distribution to any person by someone other than a licensed pharmacist, and the absolute prohibition against advertisement and display—must be measured.

Plaintiffs base their challenge to the statute principally on the right to privacy. The existence of a constitutional right to privacy, shielding certain areas of human activity from governmental intrusion, was first recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965). There, in a case involving a married couple, the Court struck down a Connecticut statute prohibiting the use of contraceptives. In subsequent decisions, the Court has recognized further dimensions to this right. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right of single persons to have access to contraceptives on the same basis as married persons); *Roe v. Wade*, 410 U.S. 113 (1973) (“fundamental” constitutional right of a woman to terminate her pregnancy, subject to regulation only by a “compelling” state interest); *Doe v. Bolton*, 410 U.S. 179 (1973) (right of a pregnant woman to make an abortion decision based on consultation with her doctor alone). Thus, constitutional protection has been extended to the most intimate phases of personal life, having to do with sexual intercourse and its possible consequences. See *Rosenberg v. Martin*, 478 F.2d 520, 524 (2d Cir.), *cert. denied*, 414 U.S. 872 (1973).

“If there is anything ‘obvious’ about the constitutional right to privacy at the present time, it is that its limits remain to be worked out in future cases.” *Roe v. Ingraham*, *supra* at 108. See Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. Rev. 670 *passim* (1973). Neither *Griswold* nor *Eisenstadt* explicitly ex-

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tended constitutional protection to the interest plaintiffs seek to have recognized here, i.e., an unlimited right to distribute and have access to contraceptives. There can be no doubt, however, that for the purposes of this motion, there is a substantial question as to whether such a constitutional right exists.

The existence of a privacy right in this case, however, would not necessarily require invalidation of state regulation of the protected activity. See *Roe v. Wade, supra* at 155-56. Therefore, the fact that each of the three challenged provisions limits access to and the distribution of contraceptives in some way does not automatically make them constitutionally suspect. However, if the exercise of a "fundamental" right is involved, it may be regulated only to the extent that regulation is justified by a "compelling" state interest. See *id.*, at 153-54. And, where governmental regulation of a constitutionally protected area is permissible, the regulation must be sufficiently narrow in scope so as to express only legitimate state interests. See *Griswold v. Connecticut, supra* at 485; *NAACP v. Alabama*, 377 U.S. 288, 307 (1964). As detailed below, questions exist, which are clearly sufficient to meet the test of *Goosby v. Osser, supra*, as to whether any one of the aspects of the statute challenged here meets these criteria.

PROHIBITION OF SALE OR DISTRIBUTION BY ANYONE OTHER
THAN A LICENSED PHARMACIST

In its papers, the State of New York advances two arguments in support of the regulation prohibiting sale or distribution to any person by anyone other than a licensed pharmacist. The first, not pressed at oral argument, is that this is a rational health measure facilitating quality control and allowing for professional advice to be given concerning the various items available.

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It is difficult to see what control can be exercised by pharmacists or any other retailers over the quality of what are generally pre-packaged items. Nor is it apparent why professional advice is more necessary with respect to these products than with respect to the many other non-prescription devices and patent medicines which are widely distributed by both pharmacists and non-pharmacists. Even if a reason were shown for having such advice available, it is not at all clear to the Court what unique qualifications licensed pharmacists possess which prepare them to give professional advice as to the use of contraceptives.

The second justification proffered is that the limitation makes it easier for the State to enforce the prohibition against distribution to persons under the age of sixteen. Assuming that prohibition would itself be a legitimate state end, there appears to be no reason why it could not as easily be effected through grocers and other groups of retailers, thus making the products more readily available to persons who are entitled to purchase them if they choose to do so.

Having considered the justifications presented by the State, the Court finds that a not insubstantial question is presented as to whether prohibiting the sale of non-prescription contraceptives by anyone other than a licensed pharmacist unconstitutionally burdens the exercise of a protected right.

PROHIBITION OF SALE OR DISTRIBUTION
TO MINORS UNDER SIXTEEN

In support of the statute's absolute prohibition of the sale of non-prescription contraceptives to persons under sixteen, New York suggests that its goal is to limit teenage extramarital sexual activity. The State then argues that although there is no evidence that such activity increases

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in proportion to the availability of contraceptives, unless such a link is explicitly disproved, it is not irrational for the legislature to restrict access to contraceptives in the hope of limiting that activity.

As a starting point, it is clear that the mere fact that a person is a minor does not except him from the protections of the Constitution. See *In re Gault*, 387 U.S. 1 (1967). "The fact that [persons] are juveniles does not in any way invalidate their right to assert their Constitutional right to privacy." *Merriken v. Cressman*, 364 F.Supp. 913 (E.D. Pa. 1973). Therefore, an immediate question with respect to this provision is whether the State's asserted interest in limiting teenage extramarital activity is of sufficient magnitude to justify the burden placed on these individuals' right to privacy.

The State argues that even where there is an invasion of protected freedoms, the power of the State to control the conduct of children reaches beyond the scope of its authority over adults, citing *Ginsberg v. New York*, 390 U.S. 629 (1968) and *Prince v. Massachusetts*, 321 U.S. 158 (1944). Those cases dealt, respectively, with limiting the access of persons under seventeen to sexual materials which might be harmful to them even though not obscene for adults, and with barring children from certain types of employment on the streets and in public places. In contrast to the situations there, cogent arguments are advanced here that the prohibited articles might serve as a positive good for the minors affected, in that access to them might diminish the incidence of venereal disease and unwanted pregnancy for persons in the affected age group.

The State disputes these contentions, but this is not the appropriate place to attempt to resolve the dispute. Suffice it to say that a not insubstantial question has been raised as to whether this provision unconstitutionally infringes the right to privacy of New York State residents under the age of sixteen.

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Even if it were to be assumed for present purposes that limiting or restricting teenage extramarital sexual activity is a legitimate State objective and that the prohibition at issue is a rational way to pursue that end, there would remain a question as to whether the State has drawn its categories here in conformity with the requirements of the Constitution.

Under the Equal Protection Clause of the Fourteenth Amendment, a classification, to be reasonable and not arbitrary, "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (emphasis added). See *Eisenstadt v. Baird*, *supra* at 446-47; *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). There may be a substantial question in this case as to whether the State has drawn its lines in a fashion commensurate with this standard. However, since the Court has already found a sufficient question under the privacy standard to require submitting this provision to a three-judge panel, it is not necessary to explore the Equal Protection question further here.

PROHIBITION OF ADVERTISEMENT OR DISPLAY

The third and final provision challenged, insofar as it applies to non-prescription devices, is the absolute ban on the display and advertising of contraceptives. It is clear that where information relating to the exercise of a constitutional right is involved, the fact that the information is in the form of an advertisement or may be tied to commercial activity does not deprive it of the First Amendment protection accorded communications and expressions of ideas. See *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 384 (1973); *Ginzburg v. United States*, 383

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U.S. 463, 474 (1966); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In the face of this authority, there is certainly a question sufficient to meet the *Goosby v. Osser*, *supra*, standard as to whether New York's *complete* ban on advertising and display violates the First Amendment. Such a complete ban may also impermissibly inhibit any existing privacy right to distribute and have access to contraceptives.

CONCLUSION

The Court has found a sufficient question as to the constitutionality of each of the three challenged provisions of § 6811(8), as applied to non-prescription contraceptives, to require submission of the issues to a three-judge district court. Accordingly, the Court declines to dismiss any part of the complaint and the defendants' motion for judgment on the pleadings pursuant to Rule 12(c) FRCP is denied. The plaintiffs' motion requesting the convening of a three-judge court is hereby granted. The request will be forwarded to the chief judge of this circuit upon filing of this opinion and order.

So ORDERED.

Dated: New York, New York
October 23, 1974

LAWRENCE W. PIERCE
U.S.D.J.

**Notice of Motion for Summary Judgment and
Plaintiffs' Statement Pursuant to Rule 9(g).**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon all the pleadings, papers and memoranda of law heretofore filed herein, and all of the affidavits and the exhibits annexed thereto, including the affidavit of Diana Altman, sworn to on May 29, 1974; the affidavit of Philip D. Harvey, sworn to on May 24, 1974; and the affidavit of Dr. Anna T. Rand, sworn to on June 20, 1974 (all annexed to the plaintiffs' motion of June 21, 1974 seeking a three judge court); and the annexed statement of material facts as to which plaintiffs contend that there is no genuine issue to be tried, the plaintiffs pursuant to Rule 56 of the Federal Rules of Civil Procedure, move this Court for an order granting summary judgment in the plaintiffs' favor on the ground that there is no genuine issue as to any material fact and that the plaintiffs are entitled to a judgment as a matter of law. At the oral argument before this Court on January 23, 1975, plaintiffs made an oral motion for summary judgment. At the request of the Court, plaintiffs now file this motion for summary judgment to support the oral motion made hereinbefore.

Based upon the foregoing, plaintiffs move that an order granting summary judgment for plaintiffs for all of the

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Plaintiffs' Statement Pursuant to Rule 9(g).*

relief demanded in the supplemental complaint, be entered by this Court.

Dated: New York, New York,
February 13, 1975.

Yours, etc.,

KARPATKIN, POLLET & LEMOULT

By
Michael N. Pollet
Attorneys for Plaintiffs

To: HON. LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
Attn.: Arlene Silverman, Esq.

STATEMENT OF THE MATERIAL FACTS AS TO WHICH
THE PLAINTIFFS CONTEND THERE IS NO MATERIAL
ISSUE TO BE TRIED PURSUANT TO RULE 9(g) OF THE
GENERAL RULES OF THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Plaintiffs contend that as to the following material facts, there is no genuine issue to be tried:

1. Plaintiffs are as follows:

(a) POPULATION SERVICES INTERNATIONAL, a not-for-profit, tax-exempt corporation wholly devoted to implementing and developing family planning and birth control programs which desires to advertise, display and distribute

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non-medical contraceptives outside of a pharmacy to New York residents both over and under the age of sixteen (Altman Affidavit, ¶¶ 4, 7 and 8);

(b) DR. ANNA T. RAND, DR. EDWARD ELKIN, and DR. CHARLES ARNOLD, three physicians active in family planning, pediatrics and obstetrics-gynecology, who treat sexually active adolescents both over and under the age of sixteen, and who advocate the distribution of non-medical contraceptives through non-pharmacy outlets (Rand Affidavit, ¶¶ 2 and 3; Supplemental Complaint, ¶¶ 4, 5 and 6);

(c) THE REVEREND JAMES B. HAGEN, an Episcopal priest who coordinates a program combatting venereal disease in which contraceptives are distributed to minors, including those under the age of sixteen (Supplemental Complaint, ¶ 7);

(d) JOHN DOE, a married resident of New York State who is the father of four children, two of whom are under the age of sixteen, and who lives at some distance from the nearest licensed pharmacist (Supplemental Complaint, ¶ 8); and

(e) POPULATION PLANNING ASSOCIATES, INC., a North Carolina corporation whose principal business is the mail order retail sale of non-prescription contraceptives, which has been threatened with prosecution for advertising its services and for selling non-prescription contraceptives in New York State (Supplemental Complaint, ¶¶ 9, 13, 14 and 14(a); Harvey Affidavit, ¶ 5).

2. Each plaintiff is chilled in the exercise of his or her chosen activity as a result of New York Education Law § 6811(8). These activities include the advertising, display, sale and distribution of non-prescription contracep-

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tives to males and females over and under the age of sixteen. (See, e.g., Altman Affidavit, ¶ 8; Harvey Affidavit, ¶¶ 5, 6; Rand Affidavit, ¶¶ 3(1) (m), 4).

3. Each plaintiff is subject to criminal penalties under § 6811(8) for his or her activities and as an advocate of the freedom to use contraceptives, since the statute is aimed and operates directly at each of them.

4. Plaintiff Population Planning Associates, Inc. (PPA) has received two warning letters from defendant, Sica, one of which directly threatened criminal prosecution. Plaintiff PPA has also been visited at its New York office by two inspectors of the defendant Board of Pharmacy, at which time defendant's inspectors explicitly threatened legal action against PPA for advertising non-prescription contraceptives in a national magazine, and for offering such products for sale in New York. (Harvey Affidavit, ¶ 5; Supplemental Complaint, Exhibits A and B; Stipulation, September 25, 1974).

5. § 6811(8) is not moribund. It was reenacted in 1971, and amendments to it were heatedly debated in 1972, 1973 and 1974, after each of which the validity and purposes of § 6811(8) were reaffirmed, and amendments seeking to ameliorate certain of the unconstitutional effects of the law were defeated. (See, Defendants' Exhibit handed up to the Court at oral argument; Plaintiffs' Reply Memorandum, Exhibit A).

6. While there are no officially reported prosecutions under § 6811(8), there are three reported prosecutions under its predecessor statute, § 1142 of the Penal Law, the last of which was in 1965. (Plaintiffs' Reply Memorandum, p. 3).

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7. There is no evidence whatsoever of any health or welfare necessity requiring that pharmacists alone be permitted to sell non-prescription contraceptives. Indeed, there is strong evidence to the contrary, that non-prescription devices are harmless and are dispensable as is any other commodity, through normal retail or other channels, particularly since the Federal government itself regulates non-prescription contraceptives (21 U.S.C. § 321(h); Rand Affidavit, ¶ 3(g); Plaintiffs' Memorandum in Support of Plaintiffs' Motion for a Three Judge Court, p. 12). There is also evidence that limiting sales to pharmacies places a heavy burden upon ease of access to contraceptives, thus restricting the conceded beneficial effects of contraceptives to those minors or adults who do engage in sexual activity regardless of the availability of contraceptives. (Rand Affidavit, ¶ 3(d), (e), (g)).

8. There is evidence on the record to show that there is absolutely no difference in the effects of unprotected intercourse upon minors under the age of sixteen and its effects upon adults. Most evidence appears to show, in fact, that the effects of such intercourse upon minors are more severely deleterious than they are to adults. Many teenage girls under the age of sixteen in New York State become pregnant as a result of unprotected intercourse, and their pregnancies, births or abortions subject them to increased medical dangers because of their youth. Their babies, if born, are more likely to be subject to severe physical deficiencies or congenital diseases, as well as economic and emotional deprivation (American Civil Liberties Union *amicus curiae* Memorandum of Law, pp. 1-16). Aside from the problems of pregnancies and parenthood, young teenagers are increasingly subject to the debilitating effects of venereal diseases as a result of un-

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protected intercourse (Plaintiffs' Reply Memorandum, pp. 14-15; American Civil Liberties Union *amicus curiae* Memorandum of Law, p. 12). Venereal disease levels have reached the epidemic stage in New York state, and evidence shows they would be likely to drop if access and use of contraceptives increased. Therefore, on a medical level, there are no possible grounds for distinction between minors and adults as far as the dire effects of unprotected intercourse, or the beneficial effects of the use of contraceptives.

9. There is absolutely no evidence in the record that teenage extra-marital sexual activity would increase if contraceptives were available. The scientific and statistical data in the record is, in fact, overwhelmingly to the contrary, and indicates that there is apparently no relation between access to contraceptives and incidence of intercourse, except that perhaps knowledgeable use of contraceptives leads to more responsible sexual behavior (Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Three Judge Court, p. 23; Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for a Three Judge Court, pp. 25-27).

10. There is evidence on the record to show that New York State permits minors access to remedial treatment for unprotected intercourse, such as abortions or treatment for venereal disease, while denying minors access to the preventive treatment by means of contraceptives (American Civil Liberties Union *amicus curiae* Memorandum of Law, pp. 23-25).

11. There is evidence on the record to support the contention that restrictions upon the availability of informa-

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Plaintiffs' Statement Pursuant to Rule 9(g).*

tion concerning contraceptives is likely to have a negative effect upon knowledge and use of contraceptives among those who would otherwise desire them (Plaintiffs' Reply Memorandum, pp. 19-20; Rand Affidavit, ¶ 3(i)).

Dated: New York, New York
February 13, 1975

KARPATKIN, POLLET & LEMOULT

By
Michael N. Pollet
Attorneys for Plaintiffs

Defendants' Statement Pursuant to Rule 9(g).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[S A M E T I T L E]

Defendants, as and for their statement pursuant to General Rule 9-g of the Southern District of New York and in opposition to plaintiffs' 9-g statement, respectfully allege:

1. Defendants dispute paragraph "1", of plaintiff's 9(g) statement except admit that an organization calling itself Population Planning Associates maintains an office on E. 56th Street, New York, New York. More particularly defendants deny the materiality of paragraphs 1(b) and 1(e).

2. Defendants dispute paragraphs "2" and "3" of plaintiffs' 9(g) statement.

3. Defendants dispute paragraph "4" of plaintiffs' 9(g) statement except admit that Population Planning Associates received two letters from defendant Sica, but dispute materiality thereof and admit that two of defendants' inspectors visited PPA at its New York office.

4. Defendants dispute paragraph "5" except admit that § 6811(8) was enacted in 1971 and that amendments which were defeated were debated in 1972, 1973 and 1974 but deny the materiality of the mere fact of reenactment.

5. Defendants deny the materiality of paragraph "6".

Defendants' Statement Pursuant to Rule 9(g).

6. Defendants dispute paragraphs "7", "8", "9", "10" and "11" and deny the materiality thereof.

Dated: New York, New York
February 28, 1975

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
By

ARLENE R. SILVERMAN
ARLENE R. SILVERMAN
Assistant Attorney General

Affidavit of Philip D. Harvey.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[S A M E T I T L E]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

PHILIP D. HARVEY, being duly sworn, hereby deposes and says:

1. I am the President of Population Planning Associates, Inc. ("PPA"), one of the plaintiffs in this lawsuit, and I submit this affidavit for the purpose of confirming and offering into evidence, the allegations set forth in paragraph 14(a) of the supplemental complaint.

2. As stated in paragraph 14(a) and confirmed in Exhibit D annexed to the supplemental complaint (the written report prepared by an inspector of the Board of Pharmacy), two inspectors, engaged and employed by the defendants Board of Pharmacy of the State of New York and Albert J. Sica, visited the New York office of plaintiff PPA on September 4, 1974. During this visit, the inspectors advised me that a PPA advertisement which appeared in the September, 1974 issue of "Playgirl" magazine, and which advertised and solicited sales of non-medical male contraceptives, as well as prescription required birth control pills, was in violation of the New York State Education Law. The inspectors stated that PPA could not lawfully sell or advertise either non-medical contraceptives which do not require a prescription or prescription required contraceptives.

Affidavit of Philip D. Harvey.

3. The inspectors further stated that if plaintiff PPA persisted in its sales, advertisement or distribution of prescriptiton contraceptives and non-medical contraceptives, that "we will institute action". I construed their statetments as a direct threat of prosecution if plaintiff PPA was to continue to engage in its constitutionally protected activities of selling, advertising and distributing non-medical contraceptives. This threat was further made perfectly clear by the form filled out by one of the inspectors and left with me, annexed to the supplemental complaint as Exhibit D. In said form, the inspector checked off two alleged violations of the New York State Education Law for soliciting prescriptions and advertising for contraceptives. The form further states that I was "advised to stop advertising for prescriptions and to stop selling contraceptives—it is a violation of the New York State Education Law."

4. At the time the inspectors visited plaintiff PPA's office, they requested and took with them one of PPA's catalogs which advertises the sale solely of non-medical contraceptives which do not require prescriptions.

I have annexed to this affidavit a catalog identical to that requested and taken by the inspectors, as Exhibit A.*

(Sworn to by Philip D. Harvey, March 5, 1975.)

* Included in Record on Appeal.

Affidavit of Reverend James B. Hagen.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

COUNTY OF KINGS }
STATE OF NEW YORK } ss.:

The REVEREND JAMES B. HAGEN, being duly sworn, deposes and says:

1. I am one of the plaintiffs in this action. I submit this affidavit for the purpose of confirming and offering into evidence the allegations set forth in paragraph 7 of the supplemental complaint.

2. I am an ordained Minister of the Protestant Episcopal Church, and am currently Rector of St. Andrews Episcopal Church, located at 4917 Fourth Avenue, Brooklyn, New York.

3. I am the Coordinator of the Sunset Action Group Against V. D. Under my direction, this group sponsors a program in which male contraceptives are sold and distributed at the Rectory of the church to local residents, both over and under the age of sixteen. The Rectory of the church is not a licensed pharmacy, nor am I a licensed pharmacist.

4. Section 6811 of the New York Education Law which prohibits these activities, chills and deters me from further similar activities, which I believe to be protected by the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

(Sworn to by James B. Hagen, March 6, 1975.)

Affidavit of Victor J. D'Amico.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

VICTOR J. D'AMICO, being duly sworn, deposes and says:

1. I am a Pharmacy Inspector with the New York State Board of Pharmacy. As an Inspector, my function is to investigate methods and procedures for handling and disposing of drugs and devices as described in the New York State Education Law, Article 137.

2. On September 4, 1974, at approximately 2 p.m., I visited the offices of Population Planning Associates at 120 E. 56th Street, New York, N.Y. pursuant to the instructions of Samuel Kirschenbaum, Senior Inspector in charge of the New York City office. I was accompanied by Inspector Mitchell DuBroff who was in training at the time and was there to observe. Mr. Kirschenbaum supplied me with an advertisement which had appeared in Playgirl magazine. The advertisement is annexed hereto.*

3. I introduced myself to an individual at the offices of Population Planning Associates who identified himself as Philip D. Harvey, President of Population Planning Associates. I showed Mr. Harvey the advertisement for birth control pills which had appeared in Playgirl magazine.

* See Exhibit C of Supplemental Complaint.

Affidavit of Victor J. D'Amico.

4. Mr. Harvey informed me that Population Planning Associates solicits prescriptions for birth control pills. These prescriptions must be pre-paid and are forwarded to Kansas for filling. I told him that this procedure is illegal in New York State. I explained that only a pharmacy registered in New York State which employs a registered pharmacist can accept and fill prescriptions.

5. I pointed out to him that the advertisement also solicited orders for male contraceptives. Mr. Harvey explained that the orders which he receives for male contraceptives are forwarded to the home office of Population Planning Associates in Chapel Hill, North Carolina. I explained to Mr. Harvey that this practice was also in violation of the New York State Education Law.

6. I informed Mr. Harvey that I would report the facts as I see them to my office. As an Inspector, it is not my function to recommend or institute legal action. I did not inform Mr. Harvey that "we will institute legal action", nor did I hear Mr. DuBroff make any such statement.

(Sworn to by Victor J. D'Amico, March 10, 1975.)

Judgment and Order.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 1572

POPULATION SERVICES INTERNATIONAL, DR. ANNA T. RAND,
DR. EDWARD ELKIN, DR. CHARLES ARNOLD, THE REVEREND
JAMES B. EUGEN, JOHN DOE, and POPULATION PLANNING
ASSOCIATES, INC.,

Plaintiffs,

—v—

MALCOLM WILSON, individually and as Governor of the
State of New York; LOUIS J. LEFKOWITZ, individually
and as Attorney General of the State of New York;
ALBERT J. SICA, individually and as Executive Secretary
of the Board of Pharmacy of the State of New York;
and BOARD OF PHARMACY OF THE STATE OF NEW YORK,
Defendants.

Upon the pleadings, the plaintiffs' motion for summary judgment and affidavits submitted in connection therewith, the defendants' motion to dismiss the complaint and affidavits submitted in connection therewith, and having heard oral argument and having considered the memoranda of law submitted by the parties, and upon all proceedings held herein, and in accordance with the opinion filed on July 2, 1975,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The plaintiffs' motion for summary judgment is granted and the defendants' motion to dismiss the complaint is denied;

Judgment and Order.

2. Section 6811(8) of the New York State Education Law ("the Act"), insofar as it applies to non-prescription contraceptives, is hereby declared to be unconstitutional in its entirety under the First and Fourteenth Amendments;

3. Defendants, their officers, agents, servants, employees and all those acting in concert with them, are hereby permanently enjoined from enforcing the provisions of the Act as it is applied to non-prescription contraceptives. With respect to that provision of the Act which prohibits the sale or distribution of non-prescription contraceptives to persons under the age of sixteen, the injunction shall become effective upon entry of judgment herein. As to those provisions of the Act which prohibit sale or distribution of non-prescription contraceptives by anyone other than a licensed pharmacist and prohibits advertisement and display of such products, the injunction is stayed for 120 days following entry of judgment herein.

Dated: New York, New York
July 16th, 1975.

HENRY J. FRIENDLY
FRIENDLY, H.J., Circuit Judge

L.W. PIERCE
PIERCE, L.W., District Judge

WILLIAM C. CONNER
CONNER, W.C., District Judge

JUDGMENT ENTERED—7/18/75
RAYMOND J. BURGBARDT
Clerk